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THE CIVIL RIGHTS ACT OF 1991: AFFIRMATIVE ACTION, DISPARATE IMPACT, AND EMPLOYMENT QUOTAS ?

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THE CIVIL RIGHTS ACT OF 1991:

AFFIRMATIVE ACTION, DISPARATE IMPACT AND EMPLOYMENT QUOTAS ?

A. Introduction

The object of this paper is to examine the prospective impact of the Civil Rights Act of 1991 (presently H.R. 1 in the United States Congress and hereinafter referred to as the "Act") <1> with regard to the evidentiary burdens under the disparate impact theory. The focus shall be on employment and the often-repeated fear that the Act will result in the adoption by employers of voluntary quotas in order to avoid the expensive and time-consuming tasks of litigation and employment criteria validation. This examination will require a long look at the concept of Affirmative Action, which is the genus of most discrimination legislation, examining its history, purpose, social use and the development of the case law involved.

From Affirmative Action, the analysis will examine the cases which developed the structure of disparate impact theory and "business necessity" defense beginning with the seminal case of **Griggs v. Duke Power Co.** <2> and concluding with a review of the changes in those aspects brought about by **Wards Cove Packing v. Atonio**. <3> The discussion will also focus on whether the changes in the allocations of proof in disparate impact cases as outlined by the United States Supreme Court in **Wards Cove** are as radical as purported by

the proponents of the Act or if, in fact, they are really rather minor, reasonable litigation practices. This paper takes the position that the disparate impact case decisions of the past several years represent a natural legal progression toward a more equitable balance between civil rights and historic discrimination.

Included in the discussion of "business necessity" <4> will be an examination of the order of proof which, under **Griggs**, required a shifting of the burden of persuasion to the employer; an allocation unique under the penumbra of employment, labor, civil rights and discrimination law, totally devised by case law, and not found in the Civil Rights Act of 1964. <5>

The provisions of the Act shall be examined in order to determine if, indeed, they merely return the state of the law to that which existed in 1987 or if they do more by increasing the advantages given to plaintiffs in the area of disparate impact litigation.

The paper shall then look at the concept of quotas, including the Title VII proscription against forcing involuntary quotas on employers. The paper suggests that more legislation like the Act may result in the voluntary adoption of quotas by employers. If the employer carries a greater burden of proof at the outset of a case, the cost and difficulty of validating and defending subjective hiring and

promotion policies and practices could be inordinately cumbersome and expensive. As a result, maintaining a proportionate numerical equilibrium between minorities and nonminorities in all aspects of employment would be much safer and less expensive. Cases involving quotas will be discussed in brief.

Finally, the conclusion will summarize the foregoing and express my own opinions as to the direction of the Supreme Court from 1987 forward, the failure of Affirmative Action in our nation in its present form, and an expressed hope for an altered agenda for civil rights in employment in the coming decade.

B. Affirmative Action - the Price of Preference

Setting the Scene

The principle to which this country has, at least formally, subscribed for the last thirty-five years and which has been codified in statutes and court rulings is one of universal equality. Martin Luther King captured that concept when he said: "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character." <6>

It is an well recognized fact that minorities have been the subject of overt, formalized, condoned, and legislated discrimination which has blocked them from everything from walking on a specific side of the street <7> to whom they marry <8>. It has kept them out of unions <9> prohibiting them from employment opportunities which are the pathway from poverty, and it has reached into the corridors of learning <10>, locking the doors to the education which serves as the key to most opportunities in life.

Although the decade of the 1960's was the fulcrum for public awareness of affirmative action, the 1954 case of **Brown v. Board of Education** <11> was where the United States Supreme Court finally acknowledged universal equality as a right when it ruled that the legal doctrine of separate-but-equal had no place in the field of education. The country began to consider that it was time - past time - to cast that discriminatory legal doctrine aside in both the public and private sectors of life. One professor noted that the public was presented with the "elementary notions of equity, stressing individual merit as the standard of personal worth and making equal treatment and equal opportunity matters of simple fairness." <12> But change, especially in the areas where it can be said we are legislating the morals and attitudes of the country, comes about slowly and it was not until the Civil Rights Act of 1964 <13> that racial discrimination in employment was formally outlawed.

In 1964, it was hoped by many that the country was developing into a color-blind society where all individuals, regardless of color, could and would advance both socially and economically by applying their own talents and abilities. Our national legislators had adopted the concept and enacted Title VII <14> and President Kennedy as well as his successor, President Johnson, issued Executive Orders which specified that in the area of federal contracts, equality should prevail and "affirmative action" would be mandated to ensure that outcome. The term originally referred to increased recruitment, outreach, and training programs. The concept referred to the taking of such measures as necessary to ensure that tests used to evaluate employment qualifications were free of racial or cultural bias and that the recruitment net of the employer was flung so wide as to allow anyone interested to be part of the employer's applicant pool. <15>

During this time there was no mention of making numbers represent the concept of equality. Nonetheless, by the late '60's it was painfully clear that the advancement of minorities was not proceeding as expected, and public figures began to take the position that it was the duty of the United States government to "restore victims of discrimination to the position they would have occupied but for the discrimination" against them or their "forebearers."<16> Making numbers the measuring stick was publicly articulated,

albeit not for the first time, by the Reverend Jesse Jackson when, in 1978, he spoke to the American Enterprise Institute and stated that "(e)quality can be measured. It can be turned into numbers." <17>

Executive Order 11246 <18> adopted this philosophy in requiring that every nonexempt federal contractor fulfill two obligations: not to discriminate against employees or applicants because of race, color, religion, sex <19> or national origin <20>; and to take affirmative action to insure that applicants and employees are employed without regard to such factors. <21> The Order provides that in the event of noncompliance, a contract may be canceled, terminated, or suspended, and after a hearing a contractor may be declared ineligible for further government contracts. <22>

The Secretary of Labor, which had been delegated responsibility for administering the requirements of the Executive Order, established the Office of Federal Contract Compliance Programs (OFCCP) <23> to accomplish the administration and enforcement.

At the heart of the Executive Order lies the requirement that an employer must take affirmative action to recruit, hire, and promote women and minorities whenever those groups are "underutilized" in the employer's workforce, and without regard to whether the employer has discriminated against

those groups in the past. Basically, the regulations require all employers with fifty or more employees and a contract or subcontract from the government to institute a formal, written affirmative action program and to set quotas, which they call goals, for minorities and women in job categories where they are "underutilized" in comparison to their "availability" in the labor market. <24>

In 1979, the Equal Employment Opportunity Commission (EEOC) underscored this approach by developing and instituting, as part of their Employment Guidelines <25>, the concept of "underrepresentation". <26>

The problem with the terms underutilization and underrepresentation is that they are not an accurate measure of discrimination and the terms themselves are misleading. When those words are used, they lend themselves to a conclusion from the mere absence in the employer's workforce of what has been geographically determined to be the technically appropriate number of minorities in the appropriate labor pool, that discrimination has occurred. <27> If employers are investigated and a numeric disparity between minority and nonminority employees is found, employers then have the burden of proof to explain why minorities were underrepresented. If they fail to provide an adequate explanation, they are directed to establish numerical minority hiring "goals" which have to be fulfilled within an specified "timetable." As a result, government

contractors began to think in terms of proportional numbers and a need to balance their workforce in order to pass OFCCP Compliance reviews.

As the government turned its efforts into achieving an equality which could be read numerically, private sector employers began to follow that lead. These employers were not covered by the guidelines on affirmative action, but they began to think of the concept in terms of hiring and promoting minorities only in direct proportion to their representation in the appropriate labor pool. Employment entered an era where, in order to be color-blind, it had to first be color-conscious. In the 1970's Affirmative action became a meeting ground for the 1960's mandates of racial equity and it underwent a "remarkable escalation of its mission from antidiscrimination enforcement to social engineering by means of quotas, goals, timetables, set-asides and other forms of preferential treatment." <28>

The Case Law of Affirmative Action

In between **Brown** <29> and 1974, the EEOC, and the OFCCP focused their attention on affirmative action and numbers. Racial classifications began appearing in the employment and education fields. In 1974, the Supreme Court declared moot the case of **DeFunis v. Odegaard** <30> in which a law student in the Pacific Northwest sued a law school claiming that he had been the subject of discrimination when the school had

granted preferences to minority applicants. By the time the case reached the Supreme Court, the law student was in his third year of law school and thus the case was declared moot. However, the in that case Supreme Court did analyze racial classifications by applying the Equal Protection Clause and stated that discrimination based on race would be constitutionally permissible only if there were compelling reasons for its justification. Unfortunately from a legal standpoint, the fact that it was declared moot rendered the decision void of serious impact.

However, four years later, the Supreme Court decided what was destined to be one of the most important Supreme Court decisions of this century, **Regents of the University of California v. Bakke.** <31> **Bakke** is the chronological leader as well as the case which captured - and fired - the attention of the American public. <32> The case also produced a badly split decision comprising six different opinions and nearly two hundred pages of judicial writing. Thus, as a judicial result, no one really "won" in **Bakke**, but the case led this country into the seemingly endless debate and litigation over minority preferences.

In **Bakke**, the Medical School of the University of California at Davis developed two admission programs to fill its one hundred openings: a regular admissions program under which eighty-four students were admitted, and a special admissions program under which sixteen minority students were

admitted. A California trial court found that the special admissions program operated as a racial quota because it foreclosed whites from competition for sixteen spaces. Minority applicants only competed against each other under the special program. The trial court concluded that the consideration of race as a factor in making admissions decisions violated the California state constitution, the Equal Protection Clause of the Fourteenth Amendment. <33>

The California Supreme Court affirmed the determination that the special admissions program violated the Equal Protection Clause and ordered Alan Bakke's admission to Davis because the University of California failed to demonstrate that Bakke would not have been admitted to medical school but for the special admission program. <34>

By the time the case made its way to the Supreme Court, the principle issue was whether explicit preferences could be given to qualified members of identified racial or ethnic groups who would have otherwise been denied a benefit: in this case admission to an institution of higher learning. In a five-to-four decision, the Supreme Court held the Davis special admissions program was unlawful. <35> The Court, however, reversed the judgment of the California Supreme Court as to prohibiting Davis from taking race <u>into account</u> as a factor in future admissions. <36> In so doing, the Court opened the door to race-conscious programs and determined that properly constructed race-conscious programs

are legal under certain criteria. <37> It became important to look at the case law in order for employers to understand what criteria was being developed, how to apply such criteria, and to determine the circumstances under which that criteria could be applied.

United Steelworkers v. Weber <38> provides the second decision by the Supreme Court dealing with the validity of affirmative action. The Kaiser Company had instituted an voluntary program under which Black employees were given preference consideration for an apprentice program. <39> Brian Weber, a White employee, sued Kaiser, claiming that the private, voluntary affirmative action plan discriminated against himself and others similarly situated in that it preferred junior Black employees as opposed to more senior White employees. Weber's claim against Kaiser was based on sections 703(a)&(d) of Title VII. <40> His claim did not involve bona fide seniority or merit systems nor did it address any limitations on court-ordered affirmative action relief under Title VII, aspects which became important in other cases.

By a 5-2 vote, the Supreme Court held that the affirmative action plan did not violate Title VII because:

(1) it was temporary,

(2) it was narrowly designed "to eliminate conspicuous racial imbalance(s) in traditionally segregated job categories <41>; and

(3) it did not overburden the nonminority employees. <42> These are keys to **Weber**: the fact that the plan was voluntarily instituted by Kaiser; it was of limited duration; and the plan allegedly did not impose a too great a burden on nonminorities in that it did not "require the discharge of white workers and their replacement with new black hirees." <43> The decision advanced the legitimacy of Affirmative Action by creating some definitive criteria to be met. In so doing, the Court moved the country toward preferential treatment for minorities, a holding which seems to be diametrically opposed to the concept of "equal opportunity" and "antidiscrimination." <44>

In the state action case of **Fullilove v. Klutznick** <45>, concerned a Congressional mandate under the Public Works Employment Act of 1977 <46> that ten percent of governmentally-funded public works contracts be "set-aside" and reserved solely for minority firms. Several contractors sought delaratory and injunctive relief, alleging that due to the MBE preference they had sustained economic injury due to enforcement of the MBE requirement and that it was unconstitutional on its face. While not an employment case, the decisions is nonetheless a good barometer of where the Court was going as far as sanctioning preferences.

In a situation where there existed identified discrimination, the Court resolved the matter under Section five of the Fourteenth Amendment <47> and Congressional power

under the Spending Clause <48>, observing that Congress had the power to regulate federal funding of state and local projects completed with public monies, and because there was "direct evidence ... that this pattern of disadvantage and discrimination (against minority construction companies) existed" <49>, and because the MBE provision did not unduly burden nonminority construction workers <50>, the provision was constitutionally valid. <51> After finding there was identified discrimination <52>, the Court found there was a compelling government interest in abolishing such discrimination and, as in **Weber**, the provision was narrowly tailored and of a temporary nature.

Four years later in **Firefighters Local Union No. 1784 v. Stotts**, <53> the Supreme Court returned to the employment context and considered a consent decree entered into under Title VII in order to "remedy the hiring and promotion practices ... with respect to the employment of blacks." <54> The Supreme Court disagreed with the district court which had upheld the plan, stating the district court had not had any evidence which reflected identified discrimination in the bargained-for seniority system. In that there was no identified discrimination, there was no corresponding need to balance the governmental interest against the burden to be place on nonminorities. The Court held, therefore, that identified discrimination was a prerequisite for affirmative

action plans and that the district court had overstepped its bounds under Title VII by upholding a bargained-for in the absence of such identification.

Two years later the Court was again faced with a layoff situation which violated a bargained-for seniority plan. In **Wygant v. Jackson Board of Education** <55> a provision had been developed as a result of pressure from the NAACP which, during layoff, protected the percentage of Black teachers which existed on the teacher workforce. In 1981, the board laid off ten nonminority school teachers, including Wendy Wygant, but retained minority teachers who had less seniority than those who lost their jobs. The nonminority teachers who had been subjected to the layoffs sued in federal court, alleging the preferential affirmative action plan violated the Equal Protection Clause <56> and Title VII <57>. The plaintiffs lost in the district court and the court of appeals, both of which, in spite of finding no actual discrimination against minorities in the Board's hiring practices, upheld the plan as an "attempt to remedy societal discrimination by providing 'role models' for minority school children." <58> The Supreme Court reversed, again finding that in the absence of identified racially discriminatory hiring practices precluded the government from having a compelling interest in an affirmative action plan which preferred on the basis of race. The Court also noted that the layoff provision was without a defined duration in that it would continue in the absence of discrimination <59>, and

that the provision placed an unacceptable burden on those innocent nonminorities. <60> With this decision, the Court reinforced its requirement that there be identified discrimination in order to justify affirmative action plans by stating that "mere societal discrimination" was insufficient. <61>

The Supreme Court also applied the Equal Protection Clause in **United States v. Paradise** <62> when upholding a court-ordered affirmative action plan. In that case, a federal district court found that the Alabama Department of Public Safety had "engaged in a blatant and continuous pattern and practice of discrimination in hiring . . ." <63> and ordered the Department to "hire one black trooper for each white trooper" <64> until at least twenty-five percent of the Department's work force was Black. <65> Twelve years later, the court found that its policies were not adequately being implemented. <66> As a result, the court invoked a fifty percent quota for promotion in the upper ranks of the Department, <67> requiring compliance with that Order "only **if** there were qualified black candidates, **if** the ranks were less than twenty-five percent black, and **if** the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank." <68>

On appeal, <69> the Court found that the Department had discriminated against Blacks for 37 years and thus there was a compelling government interest involved. It also

considered the quota requirement valid under the Equal Protection Clause based on the fact that (1) that the narrowly tailored requirement would only last until the Department issued an acceptable promotion procedure; and (2) the Department was not required to promote unqualified blacks. <70>

In **Johnson v. Transportation Agency** <71>, in the Title VII context an affirmative action plan, which preferred females over males, was challenged and brought to trial. <72> The Supreme Court reviewed the case and found that because there was evidence showing sexual imbalances in the traditionally sexually segregated job categories <73> and because the plan was designed to correct existing imbalances and was temporary, it did not violate Title VII.

More interesting than the majority opinion in **Johnson** is the concurring opinion by Justice O'Connor in which she stated that a Title VII case should be held to the same review as an Equal Protection case. According to our first female Supreme Court Justice, an employer "must have a firm basis for believing remedial action was required" <74>, and she reiterated the principle originally expressed in **Wygant**, that **societal discrimination is an insufficient basis for implementing an affirmative action plan**, even when the government implements programs which provide minorities with preferences. <75>

Of interest, not for its legal basis but rather for its reflection of social justice, is the dissent by Justice Scalia who was joined by Chief Justice Rehnquist. That opinion reveals a fear that we are contravening the purposes of Title VII and creating problems where we should have been solving them. The dissent charged the majority opinion with encouraging discrimination based on race or sex. <76> The dissent agreed with Justice O'Connor on the proposition that societal discrimination is an impermissible basis for affirmative action programs, but because there had been no finding of discrimination the dissent believed the Court's decision to uphold the plan revived the impermissible basis. <77>

Case Analysis

Is there a test of some sort which can be gleaned from this narrow review of these cases ? A test which can approximate a prediction of the validity of an affirmative action program ? A test which can be at least generally applied to determine whether nonminorities who are personally innocent can be justifiably burdened with the preferences for minorities ? if the answer to that question is "yes," then when ? Since the Court has not clearly laid out such a test, it is upon common language which we must draw.

Beginning with **DeFunis** <78>, the Supreme Court <79> analyzed racial classifications by applying the Equal

Protection Clause, and allowed that discrimination based on race would be constitutionally permissible only if there are compelling reasons for justification. <80>

In **Bakke**, the Court required specifically identified discrimination <81> and that classifications based on race were to be narrowly tailored to remedy that identified such discrimination. <82>

In **Weber**, the Supreme Court offered two more criteria which they would consider when determining the validity of a race-based plan. In addition to the narrow tailoring requirement, the Court would require any plan to be temporary and not to overburden nonminorities.

In **Wygant** and **Paradise**, by fusing it with the requirement that plans be temporary, the Court underscored the importance of the "narrowly tailored" requirement <83> and emphasized the legal point in **Paradise** that at no time should affirmative action result in employers being forced or required to hire or promote unqualified individuals. <84>

In summary, then, voluntary affirmative action plans which have been developed to provide preferential treatment to minority individuals at the expense of innocent <85> nonminority individuals will be constitutionally permissible and valid under Title VII only if the use of minority

classifications is:

(1) narrowly tailored,

(2) to satisfy a compelling government interest,

(3) to remedy identified discrimination which is not societal,

(4) is of finite duration, and

(5) will not result in the requirement for the promotion or hire of unqualified individuals.

C. Disparate Impact Prior to 1988

The concept of disparate impact has been in existence since 1971. It is one of the legal vehicles used to identify and prove discrimination. Simply put, prior to 1988 a disparate impact case is one in which discrimination is alleged to have resulted by operation of a facially neutral employment practice or policy, often unidentified. The plaintiff had to allege and demonstrate, usually by statistics, that the employer's facially neutral test or employment criteria disproportionately disqualified members of a protected class from employment or promotion and, further, was not justified by any reason offered by the employer. In the absence of specific identification of the allegedly discriminatory practice or policy, the employer was forced to defend the business necessity of his entire program.

This theory's cornerstone case is **Griggs v. Duke Power Co.** <**86**> in which Duke Power had a history of racial

discrimination and for years it had openly kept its black employees at the bottom of the labor pool. Although it abandoned those discriminatory policies prior to passage of Title VII, the company still had seniority requirements which were facially neutral and operated to keep the minority workers at the bottom of the employment totem pole. Chief Justice Burger wrote for an unanimous court, declining to condemn the practices, recognizing that the practices themselves were not the problem. He said that "(t)he touchstone (was) business necessity. If an employment practice which operate(d) to exclude (Blacks) (could not) be shown to be related to job performance, the practice (would be) prohibited." <87> In dicta, the Court stated that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." <88> For the first time, the burden was placed on the employer to justify the manner he had selected to conduct his business. This was the first iteration of the "business necessity" test which, accepted for approximately twenty years, has now become part of the debate which surrounds the Civil Rights Act of 1991.

While **Griggs** had set up the criteria for the plaintiff's prima facie case and the burden the defendant employer must bear, it was **Albemarle Paper Co. v. Moody** <89> which devised a third stage in a disparate impact case: the plaintiff's rebuttal. In **Albemarle**, even though an employer may show a business justification defense for the practice challenged by

the plaintiff, that plaintiff may still prevail if it can be established that some alternative practice would serve the employer's needs with lesser discriminatory impact.

The courts have used a variety of semantic formulations of the concept of business necessity such as "related to job performance", a "demonstrable" or "manifest" relationship, and even "strict necessity". All of which led to confusion about just what constituted the actual burden to be carried by the employer. <**90**> **Griggs** had placed on the employer a burden of demonstrating their business justification, a requirement most courts and commentators interpreted as the ultimate risk of nonpersuasion. An employer, faced with a charge of disparate impact had a claim arising from no identified source, only a mere numeric disparity and without identification of the alleged cause of that disparity he was faced with the risk of failing to prove his practices necessary.

After **Griggs** and **Albemarle**, all the "odds were stacked in favor of the plaintiff. All the plaintiff had to do was prove a statistical disparity, point to the whole of the employer's practices and policies without any specific identification, and the defendant employer was on the legal hotseat. It was widely accepted that the employer carried a burden of persuasion: the heavy burden of proof. <**91**>

D. **Disparate Impact 1988 Forward**

In 1988, thirteen years after **Albemarle**, the Supreme Court decided the case of **Watson v. Fort Worth Bank & Trust** <92> which indicated that the Court was ready to equalize the positions of the plaintiffs and defendants in Title VII cases.

Factually, the case was simple enough: Clara Watson, a black female, was hired by Fort Worth Bank & Trust in 1973. In 1980, she sought promotion to the position of teller supervisor. The position was given to a white male. Over the next few months, Ms. Watson unsuccessfully applied for three promotions and in each instance the position was awarded to a white applicant. The bank did not utilize formal criteria in evaluating applicants for promotion, but rather relied on the complete discretion of the supervisors to determine who was best qualified for the promotion. Thus, each of Ms. Watson's failures was based on subjective criteria. Eventually Ms. Watson proceeded against the bank in federal court, proceeding under both disparate treatment and disparate impact theories. Ms. Watson claimed that the bank has discriminated against blacks in a range of employment practices.

The court rejected her claim under the disparate impact theory due to the subjective nature of the alleged discriminatory practices, and addressed her individual claims

only under the disparate treatment theory. Her action was dismissed, and the court held there was no specific intent to discriminate as required by a disparate treatment theory and the bank had successfully had thus rebutted her prima facie case. Ms. Watson appealed to the Fifth Circuit which agreed that disparate treatment was the only appropriate means of challenging a subjective promotion scheme. The United States Supreme Court granted certiorari to examine the issue of whether subjective criteria could be challenged in a disparate impact case.

In vacating and remanding the decision, the Supreme Court opinion, written by Justice O'Connor, extended the **Griggs** disparate impact analysis to subjective criteria utilized for employment decisionmaking. In this respect, Watson was a victory for plaintiffs. But by the conclusion of the opinion, many of the plaintiff's bar would regard the decision as a Pyrrhic victory. <93>

The Court addressed the nature of the "business necessity" or "job relatedness" defense of the employer, and concluded that although the employer was to show a "manifest relationship" "such a formulation (was) not (to) be interpreted as implying that the **ultimate burden of proof** can be shifted to the defendant." <94> The Court clearly stated that ultimate burden of persuasion must always remain with the plaintiff, and only when the defendant had met its burden of production by offering evidence that its employment

practices were based on "legitimate business reasons," must the plaintiff carry its original burden of proof forward in rebuttal.

The decision suggested future limitations on the **Griggs** framework: first, the use of the term "legitimate business reasons;" second, Justice O'Connor's insistence that **Griggs** had not placed a burden of **proof** upon the defendant; third, the Court's statement that the plaintiff had met the burden of proving that alternative selection devices were available; and fourth, the suggestion that the judiciary should defer to the employer's judgment in the subjective criteria arena.

In so doing, the Court laid the groundwork for equalizing the litigating positions of the parties in disparate impact cases. By freeing defendant employers from the unwarranted burden of proof the Court returned the process to the traditional formulation which serves so well in all other areas of law. By making a definitive statement on the phrase "legitimate business reasons" and offering deference to the judgement of the employer when it comes to the subjective nature of those business reasons, the Court recognized that an employer must deal with competing interests when running his business: the welfare of his employees, the company's profit margin, the quality of the product her produces or service he offers. The Court recognized that the decisions that go into a successful enterprise are myriad and diverse, and it is the employer who is in the best position to

determine, all factors considered, the best mode for his achievement.

The question of civil rights is an imperative one which needs practical answers. Overly emotional responses from the civil rights communities have been unwarranted, and could possibly be explained as a cumulative effect of the decisions flowing from **Watson**. It seems that affirmative action and preferences had become considered to be a right rather than a temporary assistance. The Supreme Court civil rights cases of 1989: (**Will v. Michigan Department of State Police** <95>, **Patterson v. McLean Credit Union** <96>, **Jett v. Dallas Independent School District** <97>, **Price Waterhouse v. Hopkins** <98>, and of course **Wards Cove Packing Company v. Atonio** <99>), all seem to have struck that sore spot at the same time. For reasons that are not clear from an objective point of view, the case of **Wards Cove Packing v. Atonio** <100> has become the focal point of the dissension, with many vocal critics stating the decision dismembered the disparate impact theory case. <101>

In **Wards Cove**, two salmon canneries, one of which was the Wards Cove Packing Company (hereinafter referred to as "The Company",) owned and operated seasonal canning operations in the Alaskan wilds. The Company recruited for non-cannery positions in Seattle, Washington, hiring people with specified skills for skilled and supervisory positions. These employees were transported to Alaska at the expense of

the Company, arrived a month prior to the opening of the cannery in order to ready it for the season and stayed a month after the end of the salmon run to close it down. The Company hired its unskilled cannery employees at the site, taking its applications from the local individuals who applied. A class action case of discrimination was filed by a group of the local, non-skilled employees, consisting of minorities who were predominantly Native American, Samoan, and Filipino. The class claimed that the Company's use of subjective and objective criteria for hiring and promotion had created a stratified workforce, precluding class members from obtaining the higher-paid noncannery positions. <**102**>

For their prima facie case, the plaintiffs compared themselves as the workforce of nonskilled employees to the workforce of skilled employees, and relied solely on that statistical underrepresentation in that workforce to make their case. The **Wards Cove** Court held that a comparison of the racial composition of unskilled and skilled employees did not provide a proper basis for establishing a prima facie case of discrimination. <**103**> The Court noted that the absence of minorities holding skilled positions might be due to a "dearth" of qualified non-white applicants, and in such a case it could not be said with assurance that the selection methods or employment practices had a disparate impact on non-whites. <**104**> The evidence was "little more than a compilation of the results of the hiring process" as a whole. <**105**> The plaintiffs did not make a prima facie case

of disparate treatment because they failed to show intent, nor did they make a prima facie case of disparate impact as the they did not even purport to demonstrate the required statistical adverse impact of any particular subjective or objective practice on the designated minorities.

It is in that latter aspect that a concurring opinion from **Watson** would prove its worth. In **Wards Cove**, the court held that even if particular practices could have been said to produce racial exclusion, a prima facie case would have to include the identification of a **particular** practice. The Court said:

> "(A) Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial **imbalance** in the workforce. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII." **<106>**

Justice White considered the impact of allowing plaintiffs to simply point to a racial imbalance in the workforce to sustain a prima facie case. He believed employers would face great difficulties if this simple form of evidence, solely

presented, were to require them to defend their component selection devices which might, in the aggregate, produce the imbalance. "The only practical option for many employers will be to adopt racial quotas ... a result that Congress has expressly rejected." <107>

In order to protect against that possibility, the Court clarified the commonly conceived disparate impact case further. Previously, the Court had clarified the plaintiff's identification and causation requirement of their prima facie case as well as the burden of production carried by the defendant. The two further clarifications involved the formulation of the business necessity defense and the rebuttal of less discriminatory alternatives.

The **Wards Cove** majority framed the nature of the defendant's burden (of production) in terms of a "reasoned review." <108> The Court stated that the challenged practice need not be "essential" or "indispensable" <109> in order to survive, but it needed to undergo a reasoned review which ensured that it served, "in a significant way, the legitimate goals of the employer." <110> This formulation of the defense released the employer from the need to show that a challenged practice was a matter of strict necessity, a burden incongruent with a burden of production.

Finally, the Court examined the parameters of the rebuttal of plaintiffs. The Court stated that the plaintiff's could

still prevail if, upon rebuttal, they could persuade (or carry a burden of proof for) the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate (hiring) interests." <111> This proposition actually comes from the 1975 case of **Albemarle**, which leads one to wonder where the critics of the **Wards Cove** decision **were** during the years between the two cases. It seems that the critics believe that all of plaintiff's possibilities for success in rebuttal are dashed by the requirements of **Wards Cove** wherein the Court stated that "factors such as the cost or other burdens (will be) relevant in determining whether (the alternative proposals) would be equally as effective as the challenged practice in serving the employer's legitimate business goals." <112> Some of the articles <113> quote the Court's language out of context and state the analysis has been realigned in highly restrictive terms, suggesting that any increased financial or other costs associated with a proposed alternative, rather than merely being relevant as the Court stated, will actually preclude the alternative from being considered "equally as effective as the challenged practice." <114> This clearly is a misstatement of the Court's refinement and is the result of viewing the case from a purely plaintiff-oriented, histrionic fashion. If one reviews the case objectively, it seems a natural progression that upon reaching the rebuttal portion of a disparate impact case, the plaintiff should not be allowed to attempt to win his or her case by proposing an alternative practice or

policy which would meet the employer's needs but would be inordinately expensive or unduly burdensome.

In short, then, **Wards Cove** brought the criteria from **Griggs** forward through the clarification of **Watson** and refined it for the 90's by adopting standards which had been developed and utilized from 1975 to 1988. This disparate impact case took on a whole new look, actually beginning to look like a true litigation rather than a foregone conclusion. The plaintiffs were now allowed to challenge subjective criteria they felt to have a discriminatory impact on minorities. But they were now required to take their challenge out of a black box, and point to both the numeric disparity as well as the specific alleged cause of that disparity. Employers were then in the position to narrow their defense to the challenged area. In their defense, employers were now allowed the recognition that they are the best judge about what is the best thing for their business and given deference on that point. Further, employer defendants were not to be held to a burden of persuasion, but rather were to carry the normal burdens carried by defendants in other areas of the law. They would be required that their challenged methodology was significantly related to how they did business. Looking to the future the Supreme Court placed plaintiffs and defendants in civil rights employment cases on a more equal basis, a step concomitant with the purposes of affirmative action and Title VII.

Cases Decided Since Wards Cove

Has **Wards Cove** been as disruptive as the plaintiff's bar has expected it to be? In at least eight of the cases in which the decision has been applied it has not:

- **Emanuel v. Marsh** <115> was a case regarding the policy of the United States Army to use performance awards when making determinations on promotions to supervisory positions. The allegation was that this practice had a disparate impact on 'lacks who received only 18.2% of those awards although they made up 30.5% of the workforce. The Eighth Circuit remanded for further evidence on the defendant's reasoned review of its use of performance appraisal and to provide the plaintiffs with the opportunity to present evidence on the availability of alternatives for this practice.

- **Green v. USV Corp.** <116> was a case returned to the Third Circuit on remand from the Supreme Court to review in accordance with the holding in **Watson** and **Wards Cove**. Upon remand, the defendant's were found liable on the disparate impact theory, their defense under the "relaxed" employer's burden being insufficient.

- **Walls v. City of Petersburg** <117> was a case wherein the plaintiff, a black employee, refused to answer a background questionnaire, required of all employees, because she claimed that members of her class were more likely than whites to

have negative answers to questions as to matters concerning felony and misdemeanor convictions, homosexual activity, and outstanding debts and judgments. The Fourth Circuit went through the complete analysis, drawing on **Griggs**, **Connecticut v. Teal**, **Watson**, and **Wards Cove**, and holding for the defendant, determined that the plaintiff had only presented a mere speculation as to the potential for disparate impact and stated such speculation could not serve as evidence for the impact itself.

- **EEOC v. Metal Service Co.** <118> wherein the Third Circuit reversed the lower court's decision that the EEOC had not made out an adequate prima facie case of racial discrimination against the plaintiff. The Third Circuit stated that relaxation of the application element of the prima facie case is appropriate when the hiring process itself rather than just the decision-making which goes on behind the process is implicated in a discrimination claim or is otherwise suspect. The case was remanded for further hearings.

- **EEOC v. Joint Apprenticeship Committee** <119> is a case wherein the federal district court found that a joint apprenticeship committee's high school diploma requirement had a disparate impact on blacks and that its maximum age ceiling had a disparate impact on women. The Second Circuit

remanded for determination on the identification question under the prima facie case: whether these specific requirements caused the statistical disparities in question.

- **Hill v. Seaboard Coast Line R.R. Co.** <120> wherein the Eleventh Circuit, by applying **Wards Cove** affirmed the finding of the district court when it held that the plaintiffs had not made out a prima facie case under the disparate impact theory. The Circuit agreed with the lower court that the evidence of disparate impact offered by the plaintiffs was sparse at best. The bare assertion of statistics, without identification of any particular criteria within the challenged promotion system, would not suffice to demonstrate disparate impact.

- **Mallory v. Booth Refrigeration Supply** <121> wherein the plaintiffs failed to win their case of race discrimination with regard to promotion and wages. They appealed to the Fourth Circuit, claiming their claims should have been reviewed under both a disparate impact theory and a disparate treatment theory. The Fourth Circuit agreed but stated there was no justification for remanding the case back to the district court as the plaintiffs would not prevail under the disparate impact theory. The Fourth Circuit analyzed the plaintiffs claims under the theory as set forth in **Watson** and **Wards Cove** and stated that the difficulty lie in the plaintiff's failure to establish a sufficient statistical base from which to make their claim. Citing **Watson**, the

court stated that the plaintiffs had to show more than a mere statistical disparity; they must identify the specific employment practice which caused the exclusion of the protected group of which the plaintiffs are members.

- **Evans v. City of Evanston** <122> wherein the Seventh Circuit agreed that the plaintiffs had proven disparate impact but, in light of **Wards Cove**, remanded the case for proceedings on the issue of the legitimate business purposes of the employer. This case is particularly interesting in its discussion of the prima facie case. It states its "conclusion (that the prima facie case was sufficient under) **Wards Cove**, because after that decision the prima facie case means less than it did before, so there is less reason to be fussy about it." <123> It would seem that the opinion that **Wards Cove** placed an unfair prima facie burden on the plaintiffs is not shared by all.

Admittedly this is only eight of many cases decided since **Wards Cove**, but of the eight (8) preceding cases, discounting the unsurprising remands, the plaintiffs prevailed in 50% of the time in spite of the fact they were laboring under the supposedly onerous burdens imposed by Watson and Wards Cove. These few cases stand as at the least as a scintilla of evidence that the plaintiffs will not be completely precluded from making their prima facie cases under **Wards Cove.**

E. The New Civil Rights Act of 1991 and Disparate Impact

In order to "provide more effective deterrence and adequate compensation for victims of discrimination," the Civil Rights Act of 1990 <**124**> reintroduced as the Civil Rights Act of 1991 <**125**>, remains essentially the same and purports to respond to the recent Supreme Court decisions by "restoring the civil rights protections that were dramatically limited by those decisions." <**126**> While the Act is considered to be sweeping and expansive in scope, addressing liability and remedy issues under Title VII as well as other civil rights statutes, this paper will only address the portions which affect the **Wards Cove** approach to disparate impact.

Sections 3 and 4 of the Act are clearly written with the attempt to place plaintiffs back in their preferential position of litigation superiority. The Act is silent on the scope of the plaintiff's burden of proof in the prima facie case, stating only that an unlawful employment practice based on disparate impact is established prima facie when a plaintiff "demonstrates that an employment practice results in a disparate impact." <**127**>

- Plaintiff's Specific Identification

Plaintiff attorneys and some civil rights leaders have complained about the requirement under **Watson** and **Wards Cove** that in a prima facie case a plaintiff identify the specific

employment practice or policy which purportedly causes a disparate impact. The Act attempts to return to the **Griggs** formulation of the prima facie case and free plaintiffs of the burden of identification. Nonetheless, under the Act the plaintiff still bears this burden if the court finds that the plaintiff "can identify, from records or other information of the respondent (which is) reasonably available (through discovery or other means) which specific practice or practices contributed to the disparate impact." <128>

- Defendant's Burden of Proof

If passed as written, the critics of **Watson** and **Wards Cove** would find solace in the fact that under the Act the employer's burden is a burden of proof rather than a burden of production. Once again, this returns the state of the law to "guilty until proven innocent." Under the Act, plaintiff will prevail if the defendant fails to prove that the challenged practice or policy is "required" by business necessity. <129> In the Act, "business necessity" is defined as that "practice or group of practices (which) must bear a significant relationship to successful job performance <130>

- Demonstrating "Business Necessity" or "Job Relatedness"

There are those who would argue that the Act's "significant relationship to successful job performance" is no more rigorous than the **Wards Cove** standard of "serv(ing), in a

significant way, the legitimate goals of the employer". <131> A semantic evaluation would demonstrate the Act's standard is much more stringent. Both standards call for "significant" relationships, but the Act requires that relationship to be with regard to the successful performance of a specific **job**, whereas the **Wards Cove** standard calls for the significant relationship to the legitimate, ultimate goals of the employer. Clearly, the Act requires the employer to bear a burden which is not only heavier than that required by **Watson** and **Wards Cove**, but also heavier than ever envisioned by **Griggs** and **Albemarle**. In this respect, the drafters of the Act have gone further than a simple return to the state of the law before **Watson** and have created a burden heavier than ever before to be borne by the employer.

If the Act is made into binding legislation, the burdens and procedural disadvantages will clearly favor the plaintiffs and act to the detriment of employers. (See Section F, **Quotas**) The Act, coming on the heels of case law could so encumber the judiciary that it would become literal in its application. Employers would not have a decent shot at proving either "business necessity" or "job relationship."

- Plaintiff's Rebuttal

Oddly enough, the Act is silent on the scope of the burden of proof borne by the plaintiffs upon rebuttal should the defendants carry their burden of proving a significant

relationship to successful job performance. As noted earlier, some writers entertain the proposition that plaintiffs would be defeated at the outset should the cost of an alternative be added into the formula to determine whether an proposed alternative would be equally as effective as the challenged practice. Since the computation of cost to be borne by the employer is a reasonable consideration, silence of the Act on this aspect is prudent and wise.

F. Quotas

A quota is defined as a proportional part or share; the share or proportion assigned to each or which each of a number must contribute or gain. <132> With respect to civil rights and employment, quotas are commonly conceptualized as a proportion of employment slots reserved for minority applicants, the number of which is dependent upon the numeric composition of minorities in the geographic applicant pool irrespective of other factors such as qualifications or the number of non-minority applicants. The previously mentioned **Bakke** case <133> is one of the best examples of quotas and set-asides. In that case, the special admissions program at the Davis medical school categorized its applicants by race identifier. Reserving sixteen of one hundred slots for minority applicants resulted in white applicants, like Bakke himself, competing only for eighty-four slots while minority

applicants (first) competed for all one hundred slots and then (second) competed among themselves for the remaining sixteen.

On the whole, it was difficult enough for employers to carry the burden of proof and defend the objective aspects of their hiring and promotion systems under the **Griggs** formulation. When **Patterson v. McLean** <134> extended disparate impact to the subjective factors considered by the employers, the burdens became exceedingly difficult. Extension of the impact analysis increased the risk that employers would be forced to adopt quota or engage in preferential treatment. As stated in this paper previously since, under **Griggs**, and under the Act should it pass, a plaintiff can establish a prima facie case by "bare statistics," any imbalance in an employer's workforce would be a potential source of Title VII liability. <135> Since it is "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad innocent causes that may lead to statistical imbalances," employer's responses may be to adopt quotas "to ensure that no plaintiff can establish a statistical prima facie case." <136> If the Act relieves plaintiffs of the burden of isolating and identifying specific employment practices - be they objective or subjective - a retreat to voluntary quotas is an entirely possible, if not probable, reaction from employers. As the **Watson** plurality admits, satisfying the employer's burden "has been relatively easy to do in challenges to standardized

tests," but it can impose a heavy burden on defendant employers when their selection process includes subjective criteria. <137> Employers might adopt quotas because the inefficiency and expense of justifying each subjective criterion would be prohibitive. The plurality contended that although objective tests and criteria could be justified through formal validation studies which measure whether a given selection criterion accurately predicts on-the-job performance, " 'validating' subjective selection criteria in this way is impractical." <138>

The plurality in **Wards Cove** was concerned that the focus on statistics involved in disparate impact theory combined with the expense and difficulty associated with validating subjective practices would force employers to adopt quota systems in order to avoid statistical disparities which could bring about discrimination challenges. Congress never intended employers to take such steps to avoid disparate impact and Title VII specifically prohibits preferential treatment as follows:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of

any race, color, religion, sex, or national origin employed by any employer . . . . <139>

The fear of employers can also be understood with yet another look at the **Bakke** case. In that case, the Special Admissions program had to devise scoring criteria for minority applicants which differed from that required of white applicants. The differences between the two groups during the first year Allan Bakke was rejected are as follows: <140> (Bakke's own scores appear in parenthesis and a comparison of his scores with those averages makes one understand Allan Bakke's personal frustration.)

GPA Ave	(3.51)	MCAT Ave Verbal Score	(96)
White:	3.49	White:	81
Minority:	2.88	Minority:	46
MCAT Ave Quantitative Score	(94)	MCAT Ave Science Score	(97)
White:	76	White:	83
Minority:	24	Minority:	35
Average General Information Score	(72)		
White:	69		
Minority:	33		

When transferred into an employment setting, the stark impact of the scores themselves demonstrate why both employers and the Supreme Court fear the development of quotas. The potential for

creating a workforce of minimally qualified or less-then-qualified employees becomes very real indeed. The result are some very unpleasant considerations for the employer: will the quality of the product be diminished ? Would the price have to be decreased ? Will it be necessary to develop a training program ? Can the expense of such program be passed on to the consumer in the form of increased cost ? If the product is services, will customer base suffer ? Will the employer be able to continue business ?

The media <**141**> has recently carried a story which reflects how reliance on numeric parity and adherence to the legal euphemisms for quotas, underrepresentation and underutilization, can result in complete ruin for an employer. The employer, Mike Welbel, runs a small mail-order business from the heart of Chicago. His company provides 26 jobs, of which no less than 24 are extremely low skill, consisting in packing and shipping. Because most of his employees come from the local neighborhood, Welbel employs approximately 21 Hispanic employees and 5 Black employees. Although the facts presented have been sketchy it seems that two years ago a Black woman applied for a position and was not hired. She filed a complaint with the EEOC which was investigated and, based on the determination that Welbel should draw his workforce from a radius of 3 miles, it was concluded that Welbel should have had 8.5 Blacks in his employ and he was therefore guilty of discrimination. <**142**> Welbel argues that he was not going out of his way to avoid hiring Blacks; rather he hired people in his neighborhood. By arbitrarily expanding Welbel's workforce beyond

the distance most people would walk to go to his low-skill jobs, the EEOC established what it believed would be the appropriate composition of his workforce, an area which included a primarily Black neighborhood. Because Welbel hires from his geographically local and largely Hispanic neighborhood, the result was an "underrepresentation" of Blacks. The EEOC assessed Welbel with $340.01 in backwages for the Black woman not hired and $123.991 each in backpay for six other Black individuals the EEOC "discovered" "should" have been hired to meet his quota of 8.5 Black representation in his workforce. If forced to pay these monies, Mike Welbel will be forced out of business, and the industry will have lost one very small businessman and 26 minority employment positions. All because of quotas.

The **Watson** and **Wards Cove** framework for the allocation of the evidentiary burdens in a disparate impact case were devised in hopes of avoiding the disastrous development of quotas. First, the Court eliminated the mysterious black box of unidentified policies and practices, out of which the alleged disparate impact flowed. The plaintiff must now open that box and identify exactly which practice or policy is allegedly discriminatory. This degree of specificity prohibits the plaintiff from taking a shotgun blast approach, forcing the employer to defend its entire system, and allow the defendants to narrow their defense to the specific practice or practices challenged. The process becomes clean, clear, and even somewhat more concise; really no different than that which was required by **Albemarle** except now plaintiffs are allowed to challenge subjective criteria under the theory.

Even then, the subjective criteria must be specifically identified, reducing the scope, and thus cost, of the defendant employer's defense.

After the prima facie case is established, the defendant presently has the same burden as any other defendant under the law: the burden of production, of going forward to demonstrate after a "reasoned review" that the challenged practice bears a significant relationship to the legitimate employment goals of the business. To those who think this is a terrible blow for the plaintiffs, those who think the employer is going to be allowed to merely articulate some obscure excuse for a practice and be "let off the hook," I suggest that their faith in the requirements and expectations of the decision-makers in our judicial system is sadly lacking. The previously discussed post- **Wards Cove** cases demonstrate that the judiciary has not allowed such leniency.

The third part of the framework devised by the plurality in **Wards Cove** is the plaintiff's opportunity to rebut the employer's defense. This, as noted, remains essentially unchanged since **Griggs** with only an annotation that now cost and burden will be considerations for the courts when determining whether a proposed alternative is acceptable as an equal substitution. Again, these factors will not be determinative - a high cost will not cause an alternative to be unacceptable, nor will a low cost make one acceptable. The Court has merely taken note of something that should have been understood all along. That costs and burdens of

operating a business is a primary factor in the life of an employer and the courts are not going to put an employer out of business with inordinately expensive or unduly burdensome alternatives.

This is not to say that affirmative action quotas have not been imposed prior to the decision in Wards Cove. In fact, they have been utilized as a remedy after a finding that the defendant has engaged in illegal discrimination. Section 706(g), 42 USC Section 2000e-5(g) gives courts the power to order such relief and virtually every federal Court of Appeals has approved the use of such relief.

However, an attempt to remedy imbalances in an employer's workforce by quotas, rather than only benefiting identifiable victims of discrimination, also provides relief to people who were not victims. It must be handled with care. The Supreme Court discussed this issue in **Firefighters Local Union No. 1784 v. Stotts** <143> The Court held that a lower court exceeded its authority when it overrode a bona fide "last hired, first fired" seniority system ostensibly to preserve minority employment under a previously approved consent decree containing quotas. To override the bona fide seniority system violated two of the basic premises of acceptable quotas: it imposed relief where there was no finding of discrimination and caused the layoff of whites with greater seniority than the minorities retained. Because of certain language that some read as providing relief only to identifiable victims the case needed clarification.

In **Sheet Metal Workers Local 28 v. EEOC** <144>, the Court upheld an interim, minority membership quota against a union which had engaged in identified egregious discrimination for over 20 years. The Court held that Section 706(g), which provides that no court order shall require a remedy for an individual who was not a victim of discrimination, does not prohibit a court from ordering race-conscious relief to nonidentifiable victims when there is a past history of persistent discrimination. Thus, the absolute "identifiable victim" standard applies only to cases where "make whole" relief such as backpay and retroactive seniority, has been sought for particular individuals.

In **Firefighters Local 93 v. City of Cleveland** <145> the city had been sued several times in the past for racial discrimination and was found to have a history of racial discrimination. The city had entered into a consent decree with the plaintiffs who were minorities. The Court held that the consent decree by itself was not an "order of the court" within the jurisdiction of Section 706(g) and therefore there was no preclusion from such a decree granting relief which benefited nonvictims.

In that quotas have been obviously utilized before, it is logical that the Supreme Court would take very carefully crafted steps to ensure such relief does not become widely used, either from the bench or through the voluntary actions of employers.

G. Conclusion

In conclusion, there are two related areas to be to addressed. The first is a consideration of the value of affirmative action and the changes which might improve it in the future. The second is, with regard to the Civil Rights Act of 1991, what balance could be struck so that the employment community could work together toward more efficient equal opportunity.

Affirmative Action as a Social Concept

Affirmative action is a legal concept which has been treated as a social program. Rather than asking it only to deliver its legal mission of equal opportunity, we have insisted it create parity between the races. Our concept of equality has been converted into meaning "the same." But we are not "the same;" we are not fungible, no more than teachers, racehorses, athletes, employment positions or employers are all "the same." Continuous affirmative action, without evaluation and adjustment as well as with its focus on racial classifications, only enhances common stereotypes of minorities, <**146**> It feeds the feeling among disadvantaged minorities that everything negative which happens is a result of their victimization on the basis of color. <**147**> It develops polarization between the various minority groups who perceive themselves as vying for limited opportunities <**148**>, and creates a "new" racism; one in which the participating minorities exhibit their own across-the-board racism <**149**>, distrust and

generalized anger as well as rejection of the attempts of the White majority to push this society toward the ideological color-blind state. <150>

Affirmative Action policies center around a key assumption that without discrimination representation of minorities in the workplace would be numerically balanced. This concept is based entirely on numbers and ignores the factors of choice <151> and individuality. There is no doubt that racial imbalances due to present and historic discrimination do exist, but all disparities in representation should not be regarded as per se suspect anomalies. <152> Affirmative Action works against progress by placing nonminorities on the defensive.

It is a distressing reality is that those who are best able to take advantage of most affirmative action programs are those minorities in the top tier of the workforce, including union members and professionals. Affirmative action does not help the black dishwasher or the untrained and jobless black youth. <153>

Blacks are now suffering numerous social ills: a disastrous unemployment rate among the youth; a nationwide crisis of unwed Black teenage mothers coupled with a high mortality rate of Black infants <154>; an increase in Black-on-Black crime; inordinately low education levels among children; and a business formation rate crippled by lack of capital. Affirmative action in the

workplace has not solved these problems and these problems **must** be solved before Black individuals can take full advantage of equal employment opportunity.

Furthermore, while doing little to advance the position of minorities, affirmative action creates the impression that the existing hard-won achievements of minorities are actually the result of preferences conferred by the White majority. <155> This results in a perpetuation of racism rather than its destruction. <156>

In theory, affirmative action has all the factors which equate "fairness." It takes into account a historical injustice and offsets a contemporary White advantage with a Black preference. Supposedly then, preference replaces prejudice, and inclusion answers exclusion. It is reformist, corrective, retributive, repentant and even redemptive. <157> But by making the color of skin the basis of a preference we have redeveloped and legitimized the very combination we set out to erase, only this time in reverse.

None of this is to say that Blacks and minorities do not need policies and law which ensure and protect their rights to equal opportunity; it is impossible to repay Blacks and minorities who are living today for the historic suffering of their race <158>. Furthermore, many of the White people in this world are not responsible for the racism of the past. Can racism be held wholly responsible for minority social and economic distress ?

Although racism still taints and bends the American character, the contention by many civil rights leaders that eradication of racism and any vestiges of its existence as the precondition to minority advancement is, at best, a confession of impotence and, at worst, a retreat from individual responsibility. <159> What people of all colors must acknowledge is that personal responsibility and individual development is what is required to allow minorities to take advantage of the opportunities gained to date.

If numbers are the name of the game, then affirmative action plans have not been resounding successes. In the last thirty-five years as Blacks have gained in legal equality and opportunity, they have declined as an economic class. The Black underclass continues to grow rather than to shrink. Racial representation has been the guidepost for racial equality, but it is not the same thing. In 1964, one of the assurances Senator Hubert Humphrey and other politicians gave Congress in order to get the landmark Civil Rights Bill passed was that the bill would not require employers to use racial preferences to rectify racial imbalances and create racial equity. <160> Yet in the time that followed, racial preferences became the order of the day. But mere preferences are not training programs, they teach no skills nor offer any values. Instead, they offer entitlement as opposed to development. <161>

This cannot be seen more clearly than on the college campuses of America where the strong preferences for admission have

brought more and more Blacks and minorities into the student composition, yet Blacks have a 74% drop-out rate, <**162**> and the drop-out rate from high school is even more abysmal. <**163**> While affirmative action has manufactured diversity on campus, it has not brought about developmental equality.

It seems axiomatic that if the minorities for whom the Civil Rights Act of 1964 was to create equal opportunity cannot present themselves at the personnel door of the employer as a potential qualified and minimally educated applicant ready to seize the opportunity, then no affirmative action program in the world will provide them with the equality they deserve. For unprepared Blacks, the removal of racial barriers and the provision of preferential treatment will not enable them to enter the mainstream of the American economy. The application of race-specific solutions to their problems does nothing to prepare them to advance on their own merit. <**164**>

In the '90's actionable discrimination and integration still dominate the civil rights agenda, and the efforts of political leaders show little grasp of where the true need lies. They waste time and resources on visible agendas claiming that the military is racist <**165**>, fighting the cessation of forced busing in Oklahoma, and supporting legislation such as the Omnibus Civil Rights Act of 1991 <**166**> which provides nothing new, and which takes no steps forward toward self-affirming, self-determined equality.

It seems our civil rights leaders have failed to distinquish between the responsibility to desegregate and the need for all groups to retain an identity which provides a support system for self-esteem. Desegregation is a legal right; integration, on the other hand is a personal choice. One that cannot be forced. The national preoccupation with integration has been an assault on the self-esteem of minorities while fostering the notion of both White Guilt and White Supremacy. **<167>**

What Should/Could Be Done ?

In short, minorities must begin to take responsibility for their own success or failure. Now before that statement is attacked by liberal and conservative alike, note it is not suggested that all plans and programs be eliminated. We have the laws on the books and the interpretations in the courts to make the antidiscrimination principle work. But before those can work, the foundation must be set for self-esteem and success.

Where to begin ? First, we must cease studying the "failures" of the Black underclass and begin studying the successes which exist in every minority culture. We must promote the role models for success. Our history and social science books must be written to include minority contributions and successes; not as part of some special section or some identified week of recognition, but as part of the historic fabric.

As a group, minorities must stop sticking together when the principle being defended is erroneous. <168> Examples of this mindset are readily available in the Washington D.C. area. Recently Mayor Marion Barry was indicted and convicted on drug charges. At least twenty black officials have been indicted or charged with a crime while in office. Inevitably, the cry of "racism" is shouted from the ranks of the activist Black population. Black Americans cannot afford to idolize Black public figures who are guilty of public transgressions. If they do, their credibility as a race is undermined and as a group they forfeit the right to demand responsible behavior <169>, as would any group which blindly supported transgressors on the basis of identifying with their race. It is just that right now, Blacks have so much more to lose by doing so.

The finances for education should either be nationalized or administered on a state level so as to attempt to ensure an equality of educational quality. Belief in their own equality must start in the primary grades. Preparation for the future must start in the primary grades. Jobs can only rarely be passed from parent to child. Preparation for the responsibility of work still begins at home and continues through education.

If a quality education is made available, then the minority communities must take the responsibility for ensuring that their children attend school, learn in school, and complete school. There is no magic to the fact that Asian students uniformly outstrip their schoolmates, minority and nonminority alike. From

the day those children can understand language, they are impressed with their personal responsibility to stay in school, to learn, and to grow. This is a lesson forgotten in our country and one for which minorities suffer the most.

Education vouchers and tuition tax credits are two other possible ways to improve education. Vouchers would assume the continued mandatory public financing of education, but at the school of the parent's choice. Tax credits would refund to parents who choose private schools some or all of their tax liability that otherwise would be designated for public school support. <170>

Minorities must stop seeing themselves as victims. <171> No government or outside source will ever be able to do for minorities what they can accomplish for themselves. Minority communities must begin to emphasize their own self-help and entrepreneurship. They must look to ownership rather than to merely employment. <172> Community wealth creates a firm basis for political and social power as well as a support structure for the future. <173>

Only when we, as a nation, improve the education and training and self-esteem of our young, which necessarily and imperatively includes our minority young, will they be able to utilize the existing affirmative action programs in the manner in which they were intended.

Civil Rights Act of 1991

The preceding section is aimed at what to do to make presently existing affirmative action plans and programs the workable and successful tools they were developed to be. At this point, one should question the logic of striving to make it legally **easier** for plaintiffs to succeed in cases of job discrimination. Will making it easier for a minority to sue his or her employer solve the forementioned problems ? Will that eradicate the discrimination that does exist in the workplace ? Do we want to assume that discrimination is lurking in every shadow ? Or do we want to make our working environment more fair for all concerned ?

The premise of this paper is that continuing to make it easier and easier for a minority employee to sue his or her employer has not been a successful companion to an impaired system of affirmative action and, further, that the United States Supreme Court has recognized this fact. The Court has recognized that instead of working to improve the abilities of minorities to take advantage of equal opportunity and to compete in the workplace, legally speaking we have only made the workplace demand less of them based on their minority status. The development of the case law over the past thirty-five years was influenced by the pulsations of the civil rights movement of the '60s, through its various social machinations, up to present day. What we have realized is that while we may have made legal strides toward equal opportunity for minorities, we have done so at the expense

of the legal rights of the employer rather than by taking the requisite steps necessary to assist minorities to prepare to compete.

Clearly part of the process is social and part of the process is legal. Socially, we should consider, develop, and implement steps like unto those mentioned in the immediately preceding section. Legally, we must recognize that we cannot legislate away the discrimination of this nation from the hearts and minds of its people. We must stop attempting to do so and start enacting and enforcing the kind of color-blind legislation under which we must ultimately evolve.

With specific regard to the push for a "new" Civil Rights Act of 1991, and with narrowed regard to the parameters of this paper, there **are** a few areas which could be adopted which might not meet with opposition from the conservative coalition.

The requirement that plaintiffs identify the specific employment practice(s) or policy alleged to be the source of discrimination should remain part of the prima facie case. With intelligent discovery conducted in disparate impact cases, this is not the onerous burden many plaintiff's counsel fear.

To ensure that effective discovery can be had, an employer's failure to comply with the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures should create a rebuttable adverse inference that challenged practices have a

substantial disparate impact. There should be penalties over and above mere censure for failures to maintain these records. Such record-keeping requirements should be vigorously enforced by the EEOC. These requirements would require elaboration and clarification equal with their new significance. <174>

Were the Act to retain and embrace the requirement that plaintiffs identify the specific practice or policy alleged to be discriminatory, freeing employers from the fear of having to defend against a "shotgun" blast generally directed at a broad range of their hiring and promotion policies, a requirement that defendants carry a burden of ***proof***, while still an anomaly in the law, would not be totally unreasonable.

In addition, the requirement that the defendant employer demonstrate that the challenged practice be "reasonably related to the employers legitimate business goals" should be tightened. A requirement that the employer prove some relationship between the challenged policy/practice, the job duty and performance, as well as the business goals of the employer would be in order.

As part of the plaintiffs rebuttal, the requirement that any alternatives proposed should be equally effective and should not be inordinately expensive or unduly burdensome for the employer must be maintained. Certainly this can only be defined on a case-by-case basis for what is too expensive for Mike Welbel and his small business in Chicago may not be too expensive or burdensome for a company the size of AT&T. Furthermore, it

should be mandatory for the plaintiff to disclose the proposed alternatives and the employer's legitimate business goals during the administrative stage of the proceedings. <175>

The determination of the appropriate statistical base from which the employer is expected to draw his or her workforce, and upon which the EEOC and OFCCP makes their determinations as to underutilization and underrepresentation should be bifurcated from the rest of the case and decided before moving forward. This would result in many cases not going forward. In some instances plaintiffs would drop their suit because the labor force ruled to be appropriate would not support their theory. In other instances the defendant employers would settle and provide appropriate remedies for the same reason.

Finally, the employers in this nation could receive tax credits for hiring disadvantaged workers. <176> This type of program would serve several purposes. First, it would help to rid employers of their well-founded fear of quotas. Second, it would financially assist these employers with training programs and thereby protect the consumer against having to absorb increased prices to offset the cost of training. Finally, it would provide jobs and money to flow back into the minority community.

In Sum

The strides for the future must be based on equality and equity between the races as well as of the races. William T. Raspberry summed it best when, on March 13th, 1991, he wrote:

> "Suppose we come up with another product line based on the ideals we hold in common: equal opportunity, equitably enforced; programs designed to heal the crippling effects of past discrimination; hiring and promotion (with such programs) based on individual achievement and potential, sensitively evaluated; policies to enhance the academic and career prospects of young people who have had too little opportunity (or too little preparation). Suppose we ended production of the old model, which designed to appeal to white guilt, is no longer selling and replaced it with a new model whose chief marketing points would be its orientation toward solutions (as opposed to blame assignment) and its unambiguous fairness. . . . (I)t would sell. . . . (I)t would do more for those in need of society's help. ...America would be a better place because of it. **<177>**

ENDNOTES

1. **House Resolution 1**, 102nd Congress, 1st Session, A Bill to Amend the Civil Rights Act of 1964, January, 1991.

2. **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971)

3. **Wards Cove Packing v. Atonio**, 109 S.Ct. 2115 (1989)

4. Supra note 2 at 431.

5. **The Civil Rights Act of 1964**, 42 USC Sec. 2000e, et seq

6. The Question of Discrimination, edited by Steven Shulman and William Darity, Jr., 1989, c.9, **"Why Should We Care About Group Inequality ?"** by Glenn C. Loury, p.270.

7. **Patterson v. McLean Credit Union**, 109 S.Ct. 2363, (1989).

8. **Loving v. Virginia**, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

9. **Putterman v. Local ILGWU, and the International Ladies Garment Workers Union**, U.S. District Court, Southern District of New York, Memorandum Opinion and Order, 78 Cir. 6000 (MJL), August 20, 1983.

10. **Brea College v. Commonwealth of Kentucky**, 211 U.S. 45 (1908).

11. **Brown v. Board of Education**, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

12. **"The Parable of the Talents"**, Ben Martin, Harpers, p.22, January 1978

13. 42 U.S.C. Section 2000e, et. seq.

14. Id.

15. Counting By Race, p.11, Terry Eastland and William J. Bennett, Basic Book Publishers, 1979.

16. United States Brief Amicus Curaie in **Bakke**, p. 65.

17. **"A Conversation With the Rev. Jesse Jackson: The Quest for Economic and Educational Parity"**, AEI Studies 209 (1978).

18. 3 CFR 399, reprinted in 42 U.S.C. Section 2000e, issued on September 24, 1965 as amended. A nondiscrimination clause of some type has been required in government contracts since 1941 when President Roosevelt issued an order mandating nondiscrimination in employment by defense contractors. The history of succeeding Executive Orders is detailed in **Contractors Ass'n v. Secretary of Labor**, 442 F.2d 159, 3 FEP 395 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

19. Added by Executive Order No. 11375, 3 CFR 684, 32 Fed. Reg. 14303 (1967).

20. Supra note 18, Section 202(1).

21. Id.

22. Supra note 18, Section 202(6).

23. Prior to 1978, eleven different government agencies had contract compliance sections which had responsibility for administering and enforcing the Executive Order. In 1978, Executive Order 12086 consolidated within the OFCCP the enforcement and implementation functions previously performed by different contracting agencies.

24. See 41 CFR Part 60-2.

25. 29 CFR Part 1608 (1981).

26. 29 CFR Part 1608 et. seq. (1981).

27. Rights Commission Consultation on Affirmative Action is Discordant, Nathan Perlmutter, National Director of the Anti-Defamation League of B'nai B'rith, 47 DLR p.A-7, March 11, 1985.

28. The Content of Our Character: A New Vision of Race in America, Shelby Steele, p.114, St. Martins Press, (1990).

29. Supra note 7.

30. **DeFunis v. Odegaard**, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

31. **Regents of the University of California v. Bakke**, 438 U.S. 265, 98 S.Ct. 2733 (1978).

32. "More than sixty Amicus Curiae briefs were filed in **Bakke**, and for more than a year any new about the case seemed to rate first page status in the newspapers. Magazines and television carried in-depth reviews of the issues involved." Counting By Race, c.1, **"Bakke and Two Idea of Equality"**, Terry Eastland and William J. Bennett, Basic Book Publishers, 1979.

33. U.S. Const. amend. XIV, Section 1 provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

34. **Bakke v. Regents of the University of California**, 18 Cal 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976), **aff'd in part and rev'd in part**, 438 U.S. 265 (1978).

35. Supra note 31 at 319-320.

36. Id.

37. The Bakke Decision: Implications for Higher Admissions, W. McCormack, ed., 1978.

38. **United Steelworkers v. Weber**, 433 U.S. 193 (1979)

39. **Weber** involved Kaiser's Aluminum plant in Gramercy, Louisiana where it followed the same labor practices as in its other Louisiana plants. Kaiser hired only union craft workers, and because the craft unions excluded Blacks, Kaiser's workers were almost exclusively White. In response to racial discrimination lawsuits, the Company and the Union had agreed to include an exclusionary affirmative action plan in their collective bargaining agreement. Under this affirmative action plan, apprentices were selected for a training program on the basis of seniority, but Blacks would constitute no less than fifty percent of the trainees until the percentage of Black skilled craft workers approximated the percentage of Blacks in the local labor source.

40. Title VII, Section 703(a), 42 U.S.C. 2000e-2(a) (1982) provides:

> (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race,

color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII, Section 703(d), 42 U.S.C. 2000e-2(d) (1982) provides:

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-mangement committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

41. Supra note 38 at 209.

42. Supra note 38 at 208. (The collective bargaining agreement was of defined and thus temporary duration, resulting in the preferential affirmative action plan having a definite cessation point.)

43. Supra note 38 at 208.

44. For criticism of this case, see The **Weber** Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 **Univ. Chi. L. Rev.** 423 (1980).

45. **Fullilove v. Klutznick**, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed. 2d 902 (1980) (plurality opinion).

46. 42 U.S.C. Section 6705(f)(2)(1982) which states in part:

> [e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for **minority business enterprises**. (Emphasis added.)

This is otherwise known as the "minority business enterprise" or "MBE" provision.

47. U.S. Const. Amend. XIV, Section 5.

48. U.S. Const. Art. I, Section 8, cl. 1.

49. Supra note 45 at 478.

50. Supra note 45 at 484.

51. Supra note 45 at 492.

52. Justice Powell delivered the decision of the Court, observing that Congress had received and reviewed evidence that demonstrated that minority contractors were awarded only a small percentage of public contracts and had deemed this to be the necessary identified discrimination. See note 45 at 503.

53. **Firefighters Local Union No. 1784 v. Stotts** , 467 U.S. 561 (1984).

A consent decree between the city and the class action Black plaintiffs included an affirmative action plan which preferred Black applicants and thus discriminated against White applicants. Later, due to financial problems, the city officials had to layoff firefighters and did so in accordance with the collective bargaining agreement it had with the exclusive representative: in reverse seniority order. It was this form of layoffs which disproportionately affected minorities that brought about the case. The class representative, Stotts, asked a federal district court for an injunction of the layoffs and a modification of the consent decree due to "changed circumstances." The district court granted the plaintiff's petition, enjoining the layoffs unless the city maintained the proportional representation of Blacks in the fire department. The order directly conflicted with the bargained-for seniority system and gave unearned higher competitive seniority to recently-hired Blacks at the expense of innocent nonminorities.

54. Id. at 565.

55. **Wygant v. Jackson Board of Education**, 476 U.S. 267, 90 L.Ed.2d 260 (1986).

In **Wygant** , the collective bargaining agreement between the Jackson Board of Education and a teachers union contained a layoff provision which stated that "teachers with the most seniority in the district shall be retained, **except that at no time will there be a greater percentage of minority**

personnel laid off than the current percentage of minority personnel employed at time of layoff . . . ." Id. (Emphasis added.)

56. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1.

57. 42 U.S.C. Sections 2000e - 2000e-17 (1982) .

58. Supra note 55 at 271.

59. Supra note 55 at 275. However, it is interesting to note that in **Weber** the Supreme Court held that an affirmative action plan encompassed into a collective bargaining agreement was of finite duration in that the collective bargaining agreement itself would reach a cessation point, thereby ending the affirmative action plan. In **Wygant** , the preferential layoff policy was also embodied in a collective bargaining agreement which would have been of no greater than 3 years duration (in that it was a public employer) and yet this time the Court held, as part of their reasoning, that the provision was infinite.

60. Supra note 52 at 282-283.

61. Supra note 55 at 276.

62. **United States v. Paradise**, 489 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987).

    Note that even though this case does not involve voluntary affirmative action, the opinions by the plurality provide an indication as to how the Justices would review such a plan under the Equal Protection Clause.

63. **Paradise**, 107 S.Ct. at 1058.

64. Id.

65. Id.

66. Id. at 1062. Although the Department had hired some minorities, there were only four Black corporals, and no Black officers above the rank of corporal.

67. Id. at 1063.

68. Id.

69. On appeal, the Supreme Court addressed the issue of whether the Department's one-black-for-one-white promotion quota was narrowly tailored to serve a compelling government interest as required by Equal Protection and Due Process.

70. Supra note 63 at 1064.

71. **Johnson v. Transportation Agency** , 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2 d. 615 (1987) .

72. Basically, the facts of **Johnson** are that the County Transportation Agency implemented an affirmative action plan which provided that sex was to be used as a factor for considering qualified applicants for promotion for positions in traditionally segregated job classifications. The goal of the Agency was to attain a workforce whose composition reflected the proportion of women in the area labor pool. Eventually a woman applied for a position in one of these traditionally sexually segregated job classifications and was selected over a male with better qualifications.

73. Supra note 71 at 1453. But note that in this case there was no identified discrimination, just a numerical imbalance.

74. Supra note 71 at 1461. (O'Connor, J., concurring.)

75. Supra note 71 at 1462.

76. Supra note 71 at 1467.

77. Supra note 71 at 1471.

78. Supra note 30.

79. In an opinion written by Justice Douglas.

80. Supra note 30 at 343.

81. Supra note 28 at 309.

82. Supra note 28 at 299.

83. **Wygant**, 476 U.S. at 274-276, **Paradise**, 107 S.Ct. at 1063-1064.

84. **Paradise** at 1064.

85. "Innocent" as used in this paper refers to the state of being in which nonminority individuals holding employment positions have not engaged in or knowingly supported discriminatory policies which placed them in privileged positions. It does not refer to the concept that many nonminority individuals are in certain positions by virtue of a trickle-down effect resulting from decades of discriminatory attitudes and practices. The attitude that because someone is White, then they have per se been unfairly advantaged AND that very fact, in turn, means that a minority MUST become preferenced is an attitude which will only push the pendulum of racial hatred higher and higher.

86. Supra note 2.

87. Supra note 2.

88. Supra note 2.

89. **Albemarle Paper Co. v. Moody**, 422 U.S. 405 (1975) .

90. Since the Court's formation of the burden in rebuttal, there have been some questions as to what employers must show to justify their employment practices when faced with a charge of discrimination. In **Griggs**, the Court announced two different standards for the employer's defense: "job relatedness" and "business necessity." **Griggs v. Duke Power Co.**, 401 U.S. 431 (1971). Since these formulations, courts have used the terms interchangeably and have attached to the terms different meanings dependent upon the varied factual situations. Employment Discrimination Law, Schlei & Grossman, 314-315 (2d ed. Supp 1983-1985); see e.g. **Dothard v. Rawlinson**, 433 U.S. 321, 331, n.14 (1977) (describing business necessity as requiring any selection criteria to be essential to job safety or efficiency); **Albemarle Paper Co. v. Moody**, 422 U.S. 405, 431 (1975) (demanding there be a significant correlation between the criteria and the important elements of the job); **Chrisner v. Complete Auto Transit, Inc.**, 645 F.2d 1251, 1262 (6th Cir. 1981)(defining necessity as requiring that a challenged practice to substantially promote the proficient operation of business); **Robinson v. Lorillard Corp.**, 444 F.2d 791, 798 (4th Cir.) (defendant must show overriding business purpose necessary to efficient operations), cert denied, 404 U.S. 1006 (1971) .

91. After awhile, no one seemed to think it particularly odd that the Court had developed a concept which was singular in the American body of law: a shifting of the burden of proof to the accused. It reminds one of the Red Queen in Alice in Wonderland who said, "Verdict first, trial afterwards." (See below) We go to great lengths to protect the rights of the accused in every other aspect of our judicial system; we devise complicated technical and legal needle eyes through which officers of the court must thread their way toward proving their charges; we provide free legal counsel in hopes of ensuring the criminally charged receive a fair trial; we do not require them to testify and jealously protect their right not to do so, but when an employer with facially neutral, non-discriminatory practices is challenged, the entire approach changes.

"Rights Commission Consultation on Affirmative Action is Discordant", Panelist Barbara Bergman, University of Maryland, **Daily Labor Report** , 47 DLA A-7, March 11, 1985.

92. **Watson v. Fort Worth Bank & Trust**, 108 S.Ct. 2777 (1988) .

93. The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, Theodore Y. Blumoff and Harold S. Lewis, 69 **N.C.L.R.** 1, 33, 1990.

94. Supra note 43.

95. **Will v. Michigan Dept of State Police** , 109 S.Ct. 2304 (1989)

96. **Patterson v. McLean Credit Union**, 109 S.Ct. 2363 (1989)

97. **Jett v. Dallas Independent School District**, 109 S.Ct. 2702 (1989) .

98. **Price Waterhouse v. Hopkins**, 109 S.Ct. 1775 (1989) .

99. Supra note 3.

100. Supra note 3.

101. The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response, William B. Gould, IV, 64 **Tulane Law Rev.** 1485, June 1990; The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, Theodore Y. Blumoff and Harold S. Lewis, Jr., 69 **N.C. Law Rev.** 1, 1990; Civil Rights in Employment:

The New Generation, Linda L. Holdeman, 67 **Denver Univ. Law Rev.** 1, 1990; When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Fort Worth Bank & Trust, Anita M. Alessandra, 137 **Univ. of PA Law Rev.** 1755, 1989; The Courts' Response to the Reagan Civil Rights Agenda, Drew S. Days, III, 42 **Vanderbilt Law Rev.** 1003, May 1989; Watson v. Fort Worth Bank & Trust: Reallocating the Burdens of Proof in Employment Discrimination Litigation, Merrill D. Feldstein, 38 **Am. Univ. Law Rev.** 919, Spring 1989; Watson v. Fort Worth Bank and Trust: A Plurality's Proposal to Alter the Evidentiary Burdens in Title VII Disparate Impact Cases, W. Gregory Rhodes, 67 **N.C. Law Rev.** 725, Mar. 1989.

102. The plaintiffs also alleged racial segregation in housing; this claim is not addressed in this article.

103. Supra note 3 at 2121-22.

104. Supra note 3 at 2122.

105. See e.g., **Lowe v. Commack Union Free School Dist.**, 886 F.2d 1364, 1370 (2d Cir. 1989)(citing **Wards Cove** and **Watson**), cert. denied, 110 S.Ct. 1470 (1990). See also **Gilty v. Village of Oak Park**, 50 FEP Case 1388 (N.D. Ill. 1989) (complaint challenged "entire promotional process" rather than particular practices).

106. Supra note 3 at 2124-25 (emphasis in original).

When viewed in light of **Connecticut v. Teal**, 102 S.Ct. 2525 (1982), it seems incongruent that the plaintiff's bar finds this requirement to specifically identify the particular practice or policy which is the subject of complaint to be particularly vexious. In **Teal**, it was decided that employers could no longer use their "bottom line" racial parity as a defense to a charge of discriminatory impact. If employers cannot utilize a racially balanced bottom line as their defense, then it seems quite equitable that plaintiffs cannot use a racially imbalanced bottom line to make their prima facie case.

107. Supra note 3, (citing **Watson v. Fort Worth Bank & Trust**, 487 U.S. 977, 993, 994 n.2 (1988) (plurality opinion)).

108. Supra note 3 at 2126.

109. Id.

110. Id. at 2125-26.

111. Id.

112. Id. at 2127 (quoting **Watson**, 487 U.S. 998 (plurality opinion)).

113. The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, Theodore Y. Blumoff and Harold S. Lewis, Jr., 69 **N.C. Law Rev.** 1, 1990.

114. The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, Theodore Y. Blumoff and Howard S. Lewis, 69 **N.C.L.R.** 1, at 42, 1990.

115. **Emanuel v. Marsh**, 52 FEP Cases 616 (1990) .

116. **Green v. USX Corp.**, 52 FEP Cases 166 (1990) .

117. **Walls v. City of Petersburg**, 52 FEP Cases 39 (1990) .

118. **EEOC v. Metal Service Co.**, 51 FEP Cases 1238 (1990) .

119. **EEOC v. Joint Apprenticeship Committee**, 52 FEP Cases 130 (1990).

120. **Hill v. Seaboard Coast Line R.R. Co.**, 50 FEP Cases 1751 (1989).

121. **Mallory v. Booth Refrigeration Supply** , 50 FEP Cases 1066 (1989).

122. **Evans v. City of Evanston**, 50 FEP Cases 610 (1989).

123. Id. at 612.

124. S.2104, 101st Congress, 2d Session, 136 **Congressional Record** S9966 (Daily Ed. July 15, 1990)(President Bush vetoed the Act on Oct. 22, 1990; the Senate failed by one vote to override the veto on Oct. 24, 1990).

125. Supra note 1.

126. Supra note 1 at Section 2(b)(2) and (1), respectively.

127. Supra note 1, (adding new Title 703(k)(1)(A)).

128. Supra note 1 at Section 4 (adding new Title VII Sections 703(k)(1)(B)(i) and (iii)) .

129. See note 127.

130. Supra note 1 at Section 3 (adding Title VII, Sections 701(o) and (m), respectively, 42 U.S.C. Sections 2000e(o) and (m)).

131. Supra note 114 at 84.

132. **The New Webster Encyclopedia Dictionary of the English Language**, 1971.

133. Supra note 31.

134. Supra note 7.

135. Supra note 92 at 2787.

136. Id.

137. Id. at 2788.

138. Id. at 2787 Justice O'Connor continued:

> Some qualities - for example, common sense, good judgment, originality, ambition, loyalty, and tact - cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling.

Id.

139. 42 U.S.C. Section 2000e-2(j).

140. Supra note 15 at 8-9.

141. "Sixty Minutes", **CBS News**, 24 March 1991; "Will Quotas Ruin Mike Welbel ?", **Readers Digest**, February 1991, p.105.

142. Both "Sixty Minutes" and **Readers Digest** omit some rather pertinent facts, such as whether the EEOC issued Mr. Welbel a Notice of Right to Sue and whether he was afforded an administrative hearing. Both presentations make Welbel's position look like a "done deal" without further avenues of recourse available to him. It also appears that due to the clear fact there was no discriminatory intent, the EEOC treated the case as a disparate impact case when the facts called for a disparate treatment case. Nonetheless it would seem he should be able to present the facts surrounding his own case in the best light possible to an administrative judge and receive a more reasonable determination.

143. **Firefighters Local Union No. 1784 v. Stotts** , 467 U.S. 561 (1984) .

144. **Sheet Metal Worker s Local 28 v. EEOC**, 478 U.S. 421, 106 S.Ct. 3019 (1986) .

145. **Firefighters Local 93 v. City of Cleveland**, 478 U.S. 501, 106 S.Ct. 3063 (1986).

146. Justice Powell expoused this position in **Bakke**. He felt that for many years people had considered minorities as inferior and unable to succeed in life without preferential treatment. He saw the need to completely stop the use of racial classifications in order to advance the goal of a color-blind society. Justice Powell believed it was finally time for minorities to use their individual abilities to succeed or fail. Supra note 32 at 298-307.

147. Supra note 28, Chapter 2, "Race-Holding."

148. Affirmative Action a Failure, 102 DLR p.A-14, May 25, 1990.

149. On all levels of this philosophy the "you-had-your-and-now-it-is-time-for-mine" attitude can be found. Supreme Court Justice Thurgood Marshall, the only Black to have been selected for that high position and the gentleman who is credited with overturning the "Separate But Equal" doctrine, has manifest it himself. In Justice Douglas' memoirs "The Court Years", Douglas recalls a case in which the Court ruled against a White plaintiff who claimed he had been the victim of racial discrimination. When

Justice Douglas dissented, Justice Marshall replied, "You (White) guys have been practicing discrimination for years. Now it is our (Black) turn."

See also "Assault By Cliche, With Immunity", Joseph Sobran, **The Washington Times**, 1 Aug 90.

150. Revolutionary development in our society can be compared to the swing of a pendulum. If equality of opportunity and color-blindness is at the very bottom of the swing of the pendulum, then racism and oppression of minorities by the White majority lies at the apex of the swing on one side and racism and oppression by the preferred minority of the White majority lies at the apex of the swing on the other. Minorities themselves continue to insist on segregation of their communities by looking with disapproval on interracial relationships; by insisting that Black cultural studies in college be a separate listing rather than exist under the umbrella of Social Sciences; by insisting that there be Black Student Unions; by rejecting the idea that there are nonminorities who are not "out to get" them. All of this is laced with the deep, abiding anger which comes with being the focus of that hate and rejection of ignorant people on the streets and in power. Generalized anger will get us nowhere and combined with the attitude that because a person is a minority they are automatically entitled will only push the pendulum higher and higher at each side, never allowing it to subside into a delicate sway at the bottom.

151. Affirmative Action Reconsidered, Thomas Sowell, 42 **The Public Interest** 47 (1976).

152. Supra note 148 at A-14.

153. Id.

154. See also "Infant Mortality, Race, Behavior", William Raspberry, **The Washington Post**, Monday, April 8, A-17.

155. Supra note 151 at 63.

156. "During the 1960's, before affirmative action, black incomes in the United States rose at a higher rate than white incomes. So, too, did the proportion of blacks in college and in skilled and professional occupations - and along with this came a faster decline in the proportion of black families below the poverty line or living in substandard housing. When people ask why blacks cannot

pull themselves up the way other oppressed minorities did in the past, many white liberals and black 'spokespersons' fall right into the trap and rush in to offer sociological 'explanations.' But there is (little) to explain. The fact is that blacks **have** pulled themselves up - from further down, against stronger opposition - and show every indication of continuing to advance." At note 154 p. 63.

157. Supra note 28 at 112.

158. Supra note 28 at 119.

159. Race and Economic Opportunity, Robert L. Woodsen, 42 **Vanderbilt Law Review** 1017, May 1989.

160. Supra note 15.

161. Supra note 28.

162. Supra note 151 at 63.

163. Supra note 6.

164. Supra note 28 at 1017.

165. "Why Should Blacks Fight in the Gulf ?", Ron Walters, **The Washington Post**, Thursday, December 27, 1990, A-17; "Patriotism in the Face of Inequality", Courtland Milloy, **The Washington Post**, Tuesday, January 15, 1991, B-3; "My Black History Paradox", Edwin Darden, **The Washington Post**, Sunday, February 24, 1991, B-5.

166. House Resolution 1, 102nd Congress, 1st Session, A Bill to Amend the Civil Rights Act of 1964, introduced in January of 1991.

167. Supra note 159 at 1022.

168. "Moving Beyond Race to a Common Agenda", Jim Sleeper, **The Washington Post**, Tuesday, March 19, 1991, A-17.

169. Supra note 159 at 1029.

170. Civil Rights in Employment: The New Generation, Linda L. Holdeman, 67 **Denver Univ. Law Rev.** 1, at 58, (1990)

171. "Blacks and Whites: Assigning and Avoiding Blame", William Raspberry, **The Washington Post**, March, 1991, Editorial.

172. "Shifting the Focus From Jobs to Ownership", William T. Raspberry, **The Washington Post**, May 14, 1991, Editorial, A-23.

173. In his article on **Race and Economic Opportunity**, Robert Woodsen wrote:

> The recirculation of income in a community is the heart of its economic life. In 1982, Blacks accounted for about twelve percent of the U.S. population but only owned two percent of American businesses. In that year, most firms were individual proprietorships (ninety-five percent), had no paid employees (eighty-nine percent) and earned less than ten thousand dollars in receipts (sixty-three percent). Today (in 1989) in Harlem, over half of the 160 business on the main commercial section of 125th Street are owned by Asians, while the bulk of the rest are owned by Jewish and Italian absentee landlords. In major cities with black majority populations, such as Washington D.C. and Atlanta, once-thriving Black business districts are now either ragged islands in a sea of affluence or, as in Harlem, under new management. Vivid illustrations about that show how most dollars earned by Blacks are not passed on to other Blacks even once. Asian-Americans, on the other hand, recirculate a dollar at least four times before it leaves the community.
>
> See note 159.

174. Supra note 170.

175. Supra note 170 at 59.

176. Supra note 170.

177. "Why Civil Rights Isn't Selling", William T. Raspberry, **The Washington Post**, Wednesday, March 13, 1991, A-17.